

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBEN ALVIN SCOTT,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2002

No. 225944

Oakland Circuit Court

LC No. 99-169190-FH

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unarmed robbery, MCL 750.530, and he was sentenced as a third habitual offender, MCL 769.11, to 6 ½ to 30 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was convicted of robbing the owner and operator of a home health care business. The victim was robbed after defendant, unarmed, pushed his way into a home, where the victim was providing health care services. Defendant took cash that was intended to be used by the victim to pay his employees, some of whom worked various shifts at the home in which the robbery occurred. Defendant's fingerprints were found on the front door of the home, a bathroom toilet, and on tape used to tie up the victim. Defendant argued that he had been in the home previously to visit one of the victim's employees, but he denied any involvement in the robbery or being in the home on the day of the robbery. Defendant asserted that he could not have committed the robbery because he was on crutches due to a gunshot wound that shattered his left ankle.

Defendant argues that the trial court erred when it rejected defendant's challenge to the prosecutor's use of a peremptory challenge to strike the only African-American juror in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).<sup>1</sup>

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<sup>1</sup> The prosecutor argues that defendant has not preserved this issue. To preserve an objection to the jury selection process, a defendant must object at trial or the defendant has waived the issue on appeal. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998). We disagree with the prosecutor and conclude that defendant has preserved this issue for appellate review. Defendant objected to the prosecutor's use of the peremptory challenge; however, the trial court

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This Court's review of a trial court's *Batson* ruling is for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). In this case, we find that the trial court did not abuse its discretion when it rejected defendant's challenge to the prosecutor's use of a peremptory challenge to exclude the only African-American juror.

In *Batson*, *supra* at 96, the Supreme Court of the United States held that, in bringing forth a prima facie case of discrimination, a defendant must show that: (1) the juror belonged to a recognized racial group, (2) the prosecutor exercised a peremptory challenge to excuse the juror, and (3) the facts and relevant circumstances provided an inference that the prosecutor used a peremptory challenge in an attempt to exclude the juror based on race. Once a defendant makes a prima facie showing, the burden shifts to the prosecutor to come forward with a neutral explanation for excusing the juror. *Id.* at 97. The prosecutor's explanation for exercising the peremptory challenge need not rise to the level justifying the exercise of a challenge for cause. *Id.* The mere fact that the prosecutor used a peremptory challenge to excuse an African-American is insufficient to make a prima facie showing of discrimination. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Additionally, the mere fact that no member of a defendant's race ended up sitting on the jury is likewise insufficient to establish a prima facie showing of discrimination. *Id.*

In this case, defendant's only argument was that the juror was improperly excluded because she was African-American. This is simply insufficient. Defendant cannot establish a prima facie case demonstrating discrimination simply by indicating that the only African-American juror was excluded. Moreover, the prosecutor proffered a neutral explanation for exercising the peremptory challenge. The trial court's rejection of defendant's *Batson* challenge did not constitute an abuse of discretion.

Next, defendant argues that he was denied due process by the in-court identification made by the victim during the trial. We disagree. Defendant maintains that the in-court identification should have been suppressed because defendant was the only African-American in the courtroom and was seated at defendant's table when the victim identified him as the robber. Before trial, the victim was presented with a photographic lineup containing defendant's photograph, and he failed to identify defendant. Therefore, according to defendant, the victim could have identified defendant based on recognizing defendant from that photo and not because the victim recognized defendant as the robber. Defendant, however, does not challenge the propriety of the pretrial identification procedure.

Defendant has not preserved this issue for appellate review because defendant did not object to the in-court identification made by the victim at trial. In order to avoid forfeiture of an unpreserved issue on appeal, defendant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This test applies to unpreserved allegations

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discussed the matter off the record. Later, the trial court instructed defendant to place the matter on the record and defendant did so.

of both constitutional and non-constitutional error. *Id.* at 764. Once defendant has satisfied these requirements, this Court must exercise discretion in deciding whether to reverse. *Id.* at 763. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. *Id.*

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). We find it unnecessary to determine whether the in-court identification was improperly suggestive, or whether there was an independent basis for the identification. In *People v Davis*, 106 Mich App 351, 352; 308 NW2d 206 (1981), a witness was unable to identify the defendant during a pretrial photographic showup, and the defendant argued, therefore, that it was improper to allow the witness to identify him at trial. The pretrial identification was not impermissibly suggestive, and this Court stated that "[w]e find no authority in support of defendant's contention that the in-court identification was per se violative of due process or that the prosecution was required to establish an independent basis for the witness's in-court identification of defendant." *Id.*

In *People v Jordan*, 34 Mich App 360, 365; 191 NW2d 58 (1971), the defendant "asserted that the trial court committed reversible error by allowing the decedent's widow to identify the defendant in court as one of the robbers when she had been unable to identify him at a previous lineup and the preliminary examination." In *Jordan*, the defendant conceded that there was no improper or tainted out-of-court identification. *Id.* The *Jordan* panel concluded that there was no error in allowing the identification because the matter involved weight and credibility, and because the defense attorney was able to present evidence at trial regarding the witness' inability to previously identify the defendant at the lineup. *Id.* at 366.

Here, there was no error in allowing the victim to identify defendant at trial because there is no claim that the pretrial photographic showup was impermissibly suggestive, because the prosecutor did not have to present an independent basis, and because defense counsel was able to attack the victim's credibility based on the previous inability to identify defendant and the circumstances of the crime. Moreover, assuming error in allowing the in-court identification, any error was harmless and did not affect defendant's substantial rights, given that defendant was able to thoroughly challenge the credibility of the victim's identification, and given the extensive fingerprint evidence connecting defendant to the crime scene.

Finally, defendant argues that he was denied the effective assistance of counsel. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted a two-pronged test for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In order to establish that defendant's right to effective assistance of counsel was violated and that this violation is sufficient to justify reversal of an otherwise valid conviction, defendant

must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) the representation so prejudiced the defendant as to deprive him of a fair trial. *Pickens, supra* at 302-303. To demonstrate prejudice, the defendant must show that, but for counsel's error, the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Defendant must overcome the presumption that the challenged action or omission could conceivably be considered sound trial strategy under the circumstances. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). We will not second-guess counsel's trial tactics, *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994), "nor will [we] assess counsel's competence with the benefit of hindsight," *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, defendant argues that his trial counsel was ineffective because he failed to object to the in-court identification of defendant by the victim. Because we have determined that the in-court identification was proper, defense counsel cannot be deemed ineffective for failing to register a meritless objection. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Second, defendant argues that his trial counsel was ineffective because he failed to produce medical records during the trial. Defendant argues that the medical records would have confirmed that defendant could not have committed the armed robbery because his foot was broken and he was on crutches at the time of the incident. Because our review is limited to the record, and because the record does not indicate any specifics regarding the information contained in the medical records, defendant cannot overcome the presumption that defendant's trial counsel elected not to admit the medical records as a matter of trial strategy. Furthermore, defendant fails to show that he was prejudiced by the failure to introduce the records.

Third, defendant argues that his trial counsel was ineffective because he failed to request an adjournment after two defense witnesses did not appear to testify at trial. We disagree.

The record indicates that defendant's trial counsel requested assistance, before jury selection, with serving two defense witnesses with subpoenas. The trial court agreed to provide defendant with assistance in serving these two witnesses. However, the next day, defendant's trial counsel explained that one witness was served, but refused to appear, and the other witness could not be located.

Whether to call a witness to testify is presumed to be a matter of trial strategy. *Rockey, supra* at 76. Here, defendant has provided no information about what the witnesses would have testified to. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Therefore, we cannot conclude that defendant's trial counsel acted unreasonably or that the absence of this testimony prejudiced defendant.

Finally, defendant argues that his trial counsel was ineffective because he failed to sufficiently preserve an objection to the prosecutor's use of a peremptory challenge to remove the only African-American juror. Defendant did not raise this issue in his question presented.

Therefore, defendant has waived appellate review of this issue. *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997). Regardless, we find that defense counsel's actions did not fall below an objective standard of reasonableness, where counsel did object to the prosecutor's use of the peremptory challenge.

Affirmed.

/s/ Harold Hood  
/s/ William B. Murphy  
/s/ Jane E. Markey